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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 729

AETNA INSURANCE COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, THE BRITISH & FOREIGN MARINE INSURANCE COMPANY, LTD., COMMERCIAL UNION ASSURANCE COMPANY LIMITED, THE CONNECTICUT FIRE INSURANCE COMPANY, THE CONTINENTAL INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, THE HOME INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, NORTH BRITISH & MERCANTILE INSURANCE COMPANY, LIMITED, ROYAL INSURANCE COMPANY, LIMITED, STANDARD MARINE INSURANCE COMPANY, LIMITED, UNIVERSAL INSURANCE COMPANY and WESTCHESTER FIRE INSURANCE COMPANY,

Plaintiffs-Petitioners,

against

HENRY DU BOIS SONS COMPANY and HARTFORD FIRE INSURANCE COMPANY,

Defendants-Respondents.

PETITION FOR CERTIORARI.
BRIEF OF RESPONDENTS IN OPPOSITION TO

EDMUND F. LAMB,
Counsel for Respondents.

CORPORATE PRESS, INC., NEW YORK CITY

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Plaintiffs-Petitioners,

against

HENRY DU BOIS SONS COMPANY and HARTFORD FIRE INSURANCE COMPANY,

Defendants-Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement.

The petitioner invokes the jurisdiction of this Court under Sec. 240(a) of the Judicial Code as amended, 28

U. S. C. 347; claiming that the decision of the Circuit Court of Appeals herein (R. 35-43), reported at 144 F. (2d) 262, is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *McLanahan* v. *Marine Insurance Co.*, 5 F. (2d) 773. As a secondary contention, the petitioner urges that if its primary contention is not upheld, in such event the Circuit Court erred in failing to apply the doctrine of double insurance as announced by this Court in *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527.

Respondents contend that the decision of the Circuit Court of Appeals for the Second Circuit in the instant case, not only is not in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *McLanahan* v. *Marine Insurance Co.*, but as shown by the analysis of the *McLanahan* case in the opinion below (R. 42-43), is entirely consonant with that opinion. With respect to the secondary contention advanced by petitioner, it appears from the opinion of the Circuit Court in the instant case that the Circuit Court gave due recognition to the decision of this Court in *Home Insurance Co.* v. *Baltimore Warehouse Co.*, but appropriately held that "there is no double insurance and there can be no double recovery at all (R. 40)."

Facts.

On March 28, 1938, plaintiffs issued to defendant, Henry Du Bois Sons Company, a policy of insurance upon the tug *Ariosa* in the amount of $45,000. On August 26, 1938, the defendant Hartford Fire Insurance Company, issued a policy to the defendant Du Bois on the scow *D 22* in the amount of $10,000. On December 7, 1938, the scow D *22* while in tow of the tug *Ariosa* was in collision with the motor vessel *Segundo*, as a result of which the *Segundo* and the scow *D 22* both sustained damage (R. 4). On March

20, 1939, Du Bois instituted action against the *Segundo* in the United States District Court for the Eastern District of New York, and in the litigation which ensued both the *Segundo* and the tug *Ariosa* were held mutually at fault, resulting in a balance of damages in favor of the owners of the *Ariosa* against respondent, Du Bois, in the sum of $2,122.67 (R. 5).

On April 19, 1939, after the commencement of the aforesaid litigation the respondent, Hartford Fire Insurance Company, advanced to the respondent, Du Bois, under a loan receipt in customary form, the sum of $9,900 which was equivalent to the amount of its insurance on the *D 22* (R. 4, at f. 12). The loan receipt is set forth in full as Schedule D annexed to the complaint (R. 12). The damage sustained by the *D 22* as ultimately fixed in the litigation between Du Bois and the owners of the *Segundo* was $18,524 (R. 5, at f. 15).

The insurance policy written by the plaintiffs upon the tug *Ariosa* contains a Cross-Liabilities Collision & Tower's Liability Clause with Sistership Provision. The clause is set forth in full in the petition at pages 4 to 5. Generally, it provides that if the insured vessel (the *Ariosa*) shall cause her tow (the *D 22*) to come into collision with another vessel (the *Segundo*) and the assured as owner of the insured vessel shall become liable to pay any sums not exceeding in respect of any one casualty the value of the vessel insured, the Underwriters shall pay the assured such proportion of such sums as their subscriptions to the policy bear to the value of the vessel insured. (In the present instance the *Ariosa* was valued in the policy at the full amount of the insurance, viz., $45,000.)

The clause in question thereafter provides that "when both vessels are to blame * * * claims under the collision clause shall be settled on the principle of Cross Liabilities, as if the owners of each vessel had been compelled to pay

to the owners of the other such vessels, such one-half * * * of such latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured" (R. 40-41); and also, "that the principles involved in this clause shall apply to the case where two or more of the vessels involved are the property in part or in whole of the same owners" (R. 41). Thus the petitioners agreed to indemnify Du Bois in the event of a both to blame collision to the extent that Du Bois would be liable for the damages involved if all of the vessels were separately owned; in which event Du Bois as owner of the *Ariosa* would be liable to pay one-half the damages of the *Segundo* and one-half the damages of the scow *D 22* (R. 40).

After the entry of the final decree in the collision case a claim was stated by respondent, Du Bois, against the plaintiff-underwriters on the tug *Ariosa* pursuant to the provisions of this clause as follows (R. 5, at f. 15—R. 6, at f. 17):

To satisfy the liability of the defendant Henry Du Bois Sons Company for ½ of the *Segundo's* damages:		
½ *Segundo's* damages	$10,305.58	
Interest to date of entry of decree	1,755.62	
Costs	811.04	$12,872.24
The balance due on the damages to the dump scow *D 22*:		
½ of scow *D 22's* damages, not recovered against *Segundo*	9,262.00	
Interest to date of entry of decree	1,487.57	10,749.57
		$23,621.81

The plaintiffs first paid the balance of damage due the owners of the *Segundo* pursuant to the final decree, and thereafter paid the balance of the claim, after taking credit for the amount advanced by the respondent, Hartford, on account of the damage to the scow *D 22* with interest thereon. This payment was made and accepted without prejudice to the rights of the parties as they existed at the entry of the final decree in the collision case (R. 6, at f. 17—R. 7, at f. 21).

The plaintiffs thereupon brought the within action for a declaratory judgment, "that plaintiffs' liability under their aforesaid policy has been fully satisfied and discharged" (R. 9).

The defendants' answer admits the allegations of the complaint (R. 17). Motions were thereupon made by both the plaintiffs and the defendants for judgment on the pleadings (R. 18-19).

The Issue.

The only issue thus presented was whether or not plaintiffs were entitled in settling the claim of their assured under the Collision & Tower's Liability Clause of their policy to take credit for the amount of an insurance coverage on the scow in the absence of any provision in their policy giving them the benefit of such insurance.

The District Court, in a careful opinion, decided against the plaintiffs and granted judgment in favor of the defendant, Henry Du Bois Sons Company (R. 20-27). The opinion is reported at 53 F. Supp. 516.

The Circuit Court of Appeals in stating the issue and passing upon the petitioners' contentions with respect thereto said (R. 39-40):

> "We think the judgment below was right. It should be noted that there was no clause in the policy which the plaintiffs issued giving them the benefit of,

or any interest in, any insurance which might cover any vessel damaged through the fault of the 'Ariosa'. Not having any contractual right to any such benefit they can now have none except by operation of law. Their policy and that on the scow did not cover the same liability, and though policies are sometimes written which cover loss only to the extent of the excess over any other insurance coverage, see *Marine Transit Corporation* v. *Northwestern Fire & Marine Insurance Co.*, 2 Cir., 67 F. (2) 544, this contract was not of that kind and must, of course, be given effect as written. Moreover, this is not even an instance where an insured has already been reimbursed from other insurance partially or wholly for a loss. The Hartford policy has not been paid except upon the condition set forth in the loan receipt. Such a receipt is a lawful contract which will be enforced. *Luckenbach* v. *W. J. McCahan Sugar Refining Co.*, 248 U. S. 139. It is not an unconditional payment of the insurance.

The contention of the plaintiffs accordingly boils down to this. Because there happened to be hull insurance on a vessel not at fault which was injured through the fault of the 'Ariosa' for which they are liable under their policy, their liability is reduced by the amount of that other insurance on the ground that they can compel its collection for their benefit. As their contract with the insured failed so to limit liability they would have the court imply such limitation as a matter of law. Of course where there is double or concurrent insurance the assured may recover no more than his full loss, which is ultimately borne by the underwriters proportionately to their respective commitments. *Home Insurance Co.* v. *Baltimore Warehouse Company*, 93 U. S. 527. But here there is no double insurance and there can be no double recovery at all."

ARGUMENT.

I.

The decision below is entirely consonant with the decision in *Marine Insurance Co.* v. *McLanahan*, in the Fourth Circuit (5 F. (2d) 773).

The petitioners' argument that there is a conflict between the decision below and the decision in the Fourth Circuit in the case of *Marine Insurance Co.* v. *McLanahan* (referred to by petitioners as the Augusta-Detroit decision) proceeds upon a purely gratuitous and faulty analysis of the decision of the Circuit Court of Appeals in the Fourth Circuit in the *McLanahan* case, as is clearly pointed out in the decision below (R. 42-43). The Circuit Court of Appeals after carefully analyzing the *McLanahan* decision said (R. 43):

> "So far as that decision involved issues here presented, it was held that the insurer of a towing vessel at fault for collision damages to a vessel under common ownership could not, in the absence of policy provisions to that effect, diminish its liability under collision and sistership clauses for that loss by the amount of hull insurance paid on the policy on the vessel damaged. They were not required to pay the entire loss and the amount of the Detroit policy in addition and thus give the assured the windfall of double insurance, but they were not permitted to reduce their liability under the August policy simply because there was separate insurance on the barge lost. What was denied them is therefore in effect what was denied these plaintiffs when the trial judge denied their motion for judgment and granted that of the defendants."

The petitioners in their argument to this Court, as in their argument both before the District Court and the

Circuit Court of Appeals, attempt to make it appear that there is involved in the instant case a claim of the respondent, Hartford Fire Insurance Company, to be subrogated to rights against its own assured. No such argument has been advanced and no such principle is established by the decisions below. On the contrary, as appears from a reading of the decision of the District Court and the decision of the Circuit Court of Appeals, it is the petitioners who seek to claim the benefit of insurance which their assured had upon the scow in an effort to override their own obligation to their assured.

It has been conceded throughout this litigation that: "Had the scow not been insured at all it is clear and undisputed that the plaintiffs would have been bound under the policy on the *Ariosa* not only to pay to the *Segundo* one-half its damages but to pay one-half the scow's damages also" (R. 37). This is all that the petitioners have been compelled to do. The other one-half of the scow's damages were in effect paid by the owners of the *Segundo* by being credited to Du Bois against Du Bois' liability to the owners of the *Segundo* (R. 15-16).

It was unquestionably competent for Du Bois and Hartford to enter into an agreement between themselves whereby Hartford advanced a sum equivalent to the amount of its insurance on the scow, pending the outcome of the litigation which had been instituted by Du Bois against the *Segundo* and pending the outcome of the prosecution of any insurance claim which Du Bois might have against the Underwriters on the *Ariosa* following the outcome of the principal litigation. *Luckenbach* v. *W. J. McCahan Sugar Refining Co.*, 248 U. S. 139; *Peninsular* v. *Atlantic Mut. Ins. Co.* (E. D. Pa.), 185 Fed. 172, 177; *The Turret Crown* (C. C. A. 2), 297 Fed. 766, 778-9; *Sorenson* v. *Boston Ins. Co.* (C. C. A. 4), 20 F. (2d) 640, cert. den. 275 U. S. 555; *Automobile Ins. Co.* v. *Springfield Dyeing Co., Inc.* (C. C. A. 3), 109 F. (2d) 533.

The decision of the Circuit Court of Appeals for the Second Circuit in *China Fire Ins. Co.* v. *Davis*, 50 F. (2d) 389, cert. den., 284 U. S. 658 (Petitioners' Brief, pp. 14-15), is not to the contrary and does not make the distinction between absolute and conditional liability on the part of the underwriter, as urged by petitioners.

In that case a shipper had procured insurance on his goods which contained no clause exempting the underwriter *pro tanto* to the extent the shipper should recover against the carrier. The carrier's bill of lading contained a provision giving it the benefit of insurance. A loss having occurred, the shipper recovered from the carrier under an agreement whereby the shipper undertook to collect its insurance for the carrier's benefit. This was done, and the money collected from the insurance company eventually was paid over to the carrier. The insurance company paid under a loan receipt and requested the shipper to institute action against the carrier. After some lapse of time the insurance company, discovering what had been done, brought an action against the carrier to recover the money which it had paid under the policy, claiming that a fraud had been practiced on it. The insurance company was allowed a recovery.

The Circuit Court of Appeals in that case held that if the provision in the bill of lading giving the carrier the benefit of insurance should be valid the underwriter could have no recovery; for, if the insurance had validly been taken out for the benefit of the carrier, the underwriter would eventually be liable to the carrier for the loss and, such being the case, it would be immaterial whether the payment of the loss by the insurer had been effectuated through subterfuge or fraud; but contrariwise (p. 391):

> "If, however, the clause was invalid as an unlawful discrimination, the plaintiff may succeed upon the common count for money had. In that case the

> shipper procured by fraud what the plaintiff was not obliged to pay, because it was in that case only surety for the loss, and the principal had already paid. Moreover, it paid only on the understanding that it should have the benefit of the carrier's liability, and that too by the same form of receipt as was used in *Luckenbach* v. *W. J. McCahan Sugar Co., supra,* though any other equivalent expression would have served."

Thus in the instant case, there being no provision in the petitioners' policy giving the petitioners the benefit of other insurance on the scow, and the petitioners having, by the terms of their policy, undertaken to indemnify Du Bois for the damage to the scow as if it were the property of a third person and Du Bois were liable for such damage; it was entirely competent for Hartford and Du Bois respectively to make and accept a conditional payment of the Hartford insurance under the form of a loan receipt.

II.

There is no conflict between the decision below and the decision of this Court in *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527.

The argument advanced by petitioners under their second point is that the insurance on the scow and the insurance on the tug were double insurance. It should be noted in passing that there is no reference to this contention in the decision of the District Court; the reason for which is that the contention was first advanced in the Circuit Court of Appeals. The principle of contribution between Underwriters applied by this Court in the case of *Home Insurance Co.* v. *Baltimore Warehouse Co.,* and by the Circuit Court of Appeals in the Eighth Circuit in the case of

Dixey v. *Federal Compress & Warehouse Company*, 140 F. (2d) 820 (Petitioners' Brief, pp. 15-16), applies only where there is double insurance.

Double insurance is defined in I *Arnould on Marine Insurance* (12th Ed.), Section 330, page 469, thus:

> "Double insurance takes place when the assured makes two or more insurances on the same subject, the same risk and the same interest."

As is indicated by the decisions in *Home Insurance Co.* v. *Baltimore Warehouse Co.* and *Dixey* v. *Federal Warehouse Co.*, the insurance policies which were held to be double insurance, covered the same property against the same risks and were for the same interest.

In the case of *Home Insurance Co.* v. *Baltimore Warehouse Co.*, one of the policies had been taken out by the bailor and one by the warehouseman. The policies covered the same risks and both were for the benefit of the owners of the goods. Thus it was that this Court said in that case:

> "It follows, necessarily, that there was double insurance. The policy issued to the Warehouse Company, and those obtained by the depositors of the merchandise, covered the same property, and they were for the benefit of the same owners."

The same situation maintained in *Dixey* v. *Federal Compress & Warehouse Co.*

In neither case was there any issue as to the fault or the negligence of the warehouseman; and in both cases the policy taken out by the warehouseman covered the property in the goods, and did not cover the warehouseman's liability.

Thus as pointed out by the Circuit Court of Appeals in *Dixey* v. *Federal Compress & Warehouse Company, supra*, in answer to the contention made by the plaintiff that the warehouseman's insurance was primary insurance (p. 822):

> "No negligence in respect to the fire was charged against the warehouse company * * *.
>
> * * * They (the policies) each, in specific terms, insured against damage by fire to the specific property to the amount of the value. Although the Pennsylvania promised to pay to the plaintiffs and the Pacific promised to pay to the warehouse company, the warehouse company was required by the regulation to pass the money promptly on to the plaintiffs so that the plaintiffs' interest was the sole and real interest insured." (Matter in parentheses supplied.)

In the instant case the Hartford policy insured Du Bois against damage by marine perils to the scow *D 22* in an amount of $10,000; the plaintiffs' policy, by the provisions thereof pertinent to this controversy, insured the legal liability of Du Bois as owner of the tug *Ariosa*, for damages sustained by others in consequence of the fault of the *Ariosa*. That the said policy by its terms was extended to cover Du Bois for damages to other vessels owned by Du Bois caused by the fault of the insured vessel as if such other vessels were differently owned, cannot change the character of the insurance from one covering liability to one covering property.

The plaintiffs did not directly insure the scow *D 22* nor did they indirectly insure the said scow against marine perils. Their insurance was conditioned upon fault on the part of the insured vessel, namely, the *Ariosa*. Since the *Ariosa* has been found to be at fault, as between Hartford Fire Insurance Co. and the plaintiffs, the plaintiffs' insurance would be primary insurance and therefore liable to respond in the first instance to the extent of the coverage, which is ample. The two insurances, therefore, are not double insurance. *Sorenson* v. *Boston Ins. Co.*, 20 F. (2d) 640, cert. den. 275 U. S. 555.

The petitioners cite the Arbitrator's decision in the *Industry-Commerce* arbitration, unofficially reported at 1939 A. M. C. 717. While the Arbitrator directed appor-

tionment he recognized in doing so that he had no legal authority therefor, saying (p. 719):

> "While a case like the present does not fall within the definitions of double insurance as given in the decisions and textbooks, it seems to me to involve the same principle."

The case of *Davis Yarn Co.* v. *Brooklyn Yarn Co.*, 293 N. Y. 236, cited by petitioners, turned upon the question as to whether of several insurances all covering the same property against the same risks and for the benefit of the same owners, certain of the policies were specific insurance and others floating insurance. All of the policies were floating policies in form, but in some the addresses where the properties were to be stored were specified. The decision is merely to the effect that such specification of addresses, alone and by itself, is not sufficient to take the policies out of the category of floating insurance, and that therefore all of the insurances covering the same properties against the same risks and for the benefit of the same owners were concurrent insurance and must contribute.

Thus, as said by the Circuit Court of Appeals in the opinion below (R. 40):

> "But here there is no double insurance and there can be no double recovery at all.
>
> The important issue is whether under the so-called sistership clause hull insurance on the vessel damaged through the fault of the sister ship does in the absence of any agreement to that effect inure to the benefit of the insurer of the legal liability of the owner of the ship at fault. The risk those insurers assumed under their policy was the risk upon which the premium they received was based and there is no inequity in requiring them to perform that which they undertook and for which they were paid. If they do the result will in effect be that the *D 22*, which was not in any wise at fault, will recover her

full damages, one-half from the *Segundo* and one-half from the *Ariosa*. The *Segundo* will be paid one-half her damages by the *Ariosa*. The underwriters of the *Ariosa*, the plaintiffs, will reimburse the *Ariosa* for the one-half of the *Segundo's* damages paid and will pay the one-half of the damages sustained by the *D 22* which were not, in effect, paid by the *Segundo*."

Conclusion.

The respondents submit, therefore, that there is not any meritorious foundation upon which this Honorable Court should be called upon to review the considered opinion of the Circuit Court of Appeals for the Second Circuit in this case.

WHEREFORE, respondents pray that the petition be denied.

Respectfully submitted,

EDMUND F. LAMB,
Counsel for Respondents.